

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Local Competition	}	CC Docket No.96-98
Provisions in the Telecommunications Act)	
Of 1996	}	
)	
Inter-Carrier Compensation)	CC Docket 99-68
For ISP Bound Traffic)	

REPLY COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

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I. Introduction and Summary

Cincinnati Bell Telephone Company “CBT” is a mid-size local exchange carrier (“LEC”) serving fewer than 2% of the nation’s access lines. These Reply Comments are being filed in response to Comments filed on July 21, 2000 in response to the Commission’s Public Notice, released June 23, 2000. In its Public Notice, the Commission sought comment on a number of issues raised by the D C Circuit on its March 24, 2000 Remand of the Commission’s Declaratory Order.¹

CBT concurs in the comments filed by USTA and others to the effect that ISP traffic is jurisdictionally interstate, and that it constitutes “exchange access” to which reciprocal compensation does not apply. CBT would add that the Commission’s invitation to comment on the term “information access” provides the Commission with another line of analysis that can be used to justify its conclusion that ISP traffic is not subject to reciprocal compensation.

“Information access” was a term used in the MFJ specifically to describe ISP traffic. The Commission has historically treated ISP traffic as interstate access service. Even though this

¹ *Bell Atlantic Tel. Cos. v. FCC*, Case No. 99-1094, 2000 U.S. App. Lexis 4685 (D.C. Cir. March 24, 2000).

traffic has been exempted from traditional access charges, the Commission has consistently treated it as interstate access service. Thus, pursuant to § 251(g) of the 1996 Act and the traditional concepts of access service, reciprocal compensation cannot be applied to this traffic.

To the extent that the Commission deems it necessary to develop a compensation mechanism for ISP traffic exchanged between local carriers, it should not adopt the existing reciprocal compensation mechanism. Reciprocal compensation rates have been developed based upon average telephone traffic characteristics, which are far different from the characteristics of ISP traffic.

II. The Commission Correctly Determined That ISP Traffic Is Jurisdictionally Interstate and Is Not “Local Traffic” Subject To Reciprocal Compensation.

CBT is a member of the United States Telecom Association (USTA) and fully supports the Comments filed by USTA on July 21, 2000 in this proceeding. CBT joins USTA in urging the Commission to reaffirm its original conclusion that Internet-bound ISP traffic is jurisdictionally interstate. The Commission must once and for all settle that since calls to ISP’s are jurisdictionally interstate, reciprocal compensation does not apply.

A. ISP-Bound Traffic Can Also Be Characterized As “Information Access”

If the Commission is forced to choose between the categories of “telephone exchange service” and “exchange access,” CBT fully endorses the analysis in USTA’s comments that ISP traffic is “exchange access.” However, the fact that, in its Public Notice, the Commission sought comment on the relevance of the concept of “information access” points to another viable conclusion. While very few parties commented on the term “information access,” CBT believes that it may be critical to the proper analysis of ISP traffic and would provide the Commission

with a clear mechanism to reaffirm its conclusion that ISP traffic is access service and is not subject to reciprocal compensation.

The Commission and most commenting parties appear to assume that all traffic must be either “telephone exchange service” or “exchange access.” In fact, the Commission has taken the position in the past that these categories are mutually exclusive and encompass all telecommunications traffic. Nowhere in the 1996 Act is it said that “exchange access” and “telephone exchange service” exhaust the universe of telecommunications traffic. A closer review of the 1996 Act reveals that there is clearly a third category of traffic, “information access,” which, while very similar to “exchange access” squarely encompasses ISP traffic. Clearly, ISP calls are “information access” which is either a subset of or an alternative to “exchange access.” The D.C. Circuit’s difficulty in attempting to reconcile the Commission’s treatment of ISP traffic as “access traffic” with the statutory definition of “exchange access” was an unnecessary struggle. When ISP traffic is properly considered as “information access,” it becomes quite clear that it is an “access service” and that the Commission’s conclusion that it is not subject to reciprocal compensation was sound.

CBT agrees with Qwest that ISP traffic is most accurately described as “information access.”² Together with “exchange access,” “information access” comprises the broader category of “access services” which the Commission has addressed over the years. A key provision of the 1996 Act in this analysis is § 251(g), which has been overlooked by most commenting parties:

(g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS. --On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to

² Qwest Comments at 12-13.

interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

It is apparent from the wording of this provision that Congress must have believed that there are three categories of service provided by local exchange carriers, “exchange access,” “information access” and “exchange services.” In addition, it indicated that “information access” and “exchange access” were provided to “interexchange carriers and information service providers” respectively.

“Information access” must be given meaning apart from “exchange access” and “exchange services” for § 251(g) to be given complete effect. It is clear that “information access” refers to the definition in the AT&T Modification of Final Judgment (“MFJ”).³ See § 274(h)(2)(A) (excepting “information access” from the term “electronic publishing” and referring to the MFJ for a definition). The MFJ contains the following definition:

“Information access” means the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signaling, answer supervision, automatic calling number identification, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers.

See *United States v. American Tel. and Tel. Co.*, 552 F.Supp. 131, 229 (D.D.C. 1982). The MFJ defined “information service” in all material respects identically to its definition in the 1996 Act.

³ Global NAP concurs in this conclusion. Global NAP Comments at 33.

Thus, the reference to “information access” in § 251(g) of the 1996 Act is clearly referencing telecommunications services that local exchange carriers provide to information service providers and would encompass ISP-bound traffic.

Several parties have pointed out that the Commission previously ruled that “information access” is not a separate category of traffic from “telephone exchange service” or “exchange access.”⁴ CBT believes that the Commission should reconsider that earlier ruling and conclude that ISPs use “information access,” which is different from “exchange access.” The Commission had earlier reached the conclusion that ISPs use “information access.”⁵ In the *Advanced Services Remand Order*, the Commission concluded that “information access” was not a category separate and distinct from telephone exchange service and exchange access because the MFJ definition of the term included the phrase “the provision of specialized exchange telecommunications services by a BOC in an exchange area . . .” The Commission concluded that this indicated that information access was only a subcategory of a broader category of services. However, this logic would equally lead to the conclusion that “exchange access” was also a subcategory of exchange services. The MFJ definition of “exchange access” also stated that it was “the provision of exchange services” and that it occurs “in an exchange area.” Thus, there was no meaningful distinction between the definitions of “information access” and “exchange access” in that regard. However, each definition went on to specify to whom the particular services were rendered: information service providers and interexchange carriers. The

⁴ See Focal/Allegiance/Adelphia Comments at 16 and Pac-West Comments at 18, citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand (rel. Dec. 23, 1999), at ¶¶ 46-48.

⁵ *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking (rel. Dec. 24, 1996), 11 FCC Rcd 21905, at n. 621.

Commission should conclude from this that information access and exchange access are distinct categories of access service.

B. “Information Access” Is A Category of “Access Service.”

The D.C. Circuit’s criticism of the Commission’s use of the term “access service” to describe service provided to ISPs is unfounded. “Access service” is a generic term that encompasses both exchange access and information access. The Commission’s regulations define “access service” as “services and facilities provided for the origination or termination of any interstate or foreign telecommunication.” 47 C.F.R. § 69.2(b). Both “information access” and “exchange access” fall into the overall category of interstate access services. The only difference between the two is that one form of access is for purposes of making calls to interexchange carriers and the other form of access is for making calls to information service providers.

Two commentators argue that “information access” is a form of local service.⁶ Neither of their arguments are logical. WorldCom’s conclusion that calls to ISPs cannot be deemed “information access” is groundless as that is the very definition of the term in the MFJ. WorldCom argues that information access is merely a specialized form of exchange service and, therefore, must be local service. This argument ignores the MFJ’s definition of “exchange access” which is also defined as a form of exchange service. Thus, information access is no more a local service than is exchange access.

Global NAP, on the other hand, does not deny that ISP traffic is “information access,” but argues that the Commission’s historical treatment of ISP traffic means that information access is local service. Global NAP has reached the wrong conclusion as a result of the Commission’s

⁶ Global NAP Comments at 33; WorldCom Comments at 15.

ISP access charge exemption. To the contrary, as shown in the next section, the Commission has always been clear in its decisions over the years that ISP traffic is interstate access traffic.

However, the Commission has allowed ISPs to obtain their interstate access services by paying local subscriber charges instead of per minute of use access charges.

C. The Commission Has Never Classified ISP Traffic As “Local Traffic.”

A review of the Commission’s prior decisions indicates that ISP traffic has never been considered “local traffic” but has always been considered interstate access traffic, even though it was exempted from access charges. The ESP⁷ access charge exemption was created in 1983, when public Internet usage was virtually non-existent.⁸ At that time, access charges themselves were relatively new and the Internet was in its infancy. In the *MTS/WATS* Order, the Commission stated that its original intent had been to apply access charges to enhanced service providers.⁹ ESPs were characterized as “users of access service” and the Commission stated that ISPs use LEC services or facilities “for the purpose of completing interstate calls which transit its location.”¹⁰ ESPs “would make relatively heavy interstate use of local exchange services and facilities to access its customers.”¹¹ However, rather than impose per minute of use interstate access charges on ESPs, the Commission decided to protect them from “rate shock.” “Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation

⁷ The term “enhanced service provider” or “ESP” encompasses ISPs, but is a broader category of users. For purposes of simplicity, CBT will use the terms ESP and ISP interchangeably in these comments.

⁸ *In the Matter of MTS and WATS Market Structure*, 97 F.C.C. 2d 682 (rel. August 22, 1983) (“*MTS/WATS Order*”).

⁹ *Id.* at ¶ 76.

¹⁰ *Id.* at ¶ 78.

¹¹ *Id.* (emphasis added).

which could affect their viability.”¹² There is no doubt that the Commission understood that ESPs used the local network for interstate access. It defined the term “access service” as “services and facilities provided for the origination or termination of any interstate or foreign telecommunication.”¹³

In 1987, the Commission issued a Notice of Proposed Rulemaking to reconsider whether ESPs should be assessed access charges. The Commission stated that ESPs “like facilities-based interexchange carriers and resellers, use the local network to provide interstate services.”¹⁴ However, the Commission decided not to eliminate the exemption from interstate access charges afforded to enhanced service providers at that time.¹⁵ Referring to the *MTS/WATS Order*, discussed above, the Commission stated: “In 1983 we adopted a comprehensive ‘access charge’ plan for the recovery by local exchange carriers (LECs) of the costs associated with the origination and termination of interstate calls.”¹⁶ The Commission described the exemption, not as a determination that ESP traffic was local traffic, but that ESPs would be treated as end users for purposes of paying for their interstate access usage: “Under our present rules, enhanced service providers are treated as end users for purposes of applying access charges. Therefore, enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.”¹⁷ The Commission stated that the ESP industry was in a period of substantial change and, once again,

¹² *Id.* at ¶ 83 (emphasis added).

¹³ 47 C.F.R. § 69.2(a).

¹⁴ *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 2 FCC Rcd 4305, 4306 (1987).

¹⁵ *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (rel. Apr. 27, 1988).

¹⁶ *Id.* at ¶ 2.

¹⁷ *Id.* at n. 8.

decided not to burden the industry with access charges: “Thus, the current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges.”¹⁸

The Commission returned to the ESP access charge exemption in 1989. Reciting the history of the exemption, the Commission confirmed that ESPs make interstate use of the local network: “At the time we formulated our access charge rules, some interstate service providers, including certain basic service resellers and ESPs, were using local business lines to obtain access to the local exchange for their interstate traffic.”¹⁹ “As a result, many ESPs currently pay state-tariffed business line rates and subscriber line charges for their switched interstate access connections.”²⁰ The Commission determined that it would not disturb the ESP exemption, but examined whether an alternative means of implementing it should be adopted.²¹ The Commission acknowledged that the exemption was causing interstate costs to be recovered from intrastate rates and considered whether some other means of access charge recovery should be employed. The Commission concluded that other interstate access customers were not unduly burdened by the ESP exemption, but imposing interstate traffic-sensitive charges would cause instability for the ESP industry.

The Commission revisited the ESP access charge exemption again in its 1997 Access Charge Reform Order.²² Again, the Commission began its discussion by confirming that ISPs

¹⁸ *Id.* at n. 53.

¹⁹ *Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 4 FCC Rcd 3983 (rel. May 9, 1989), at ¶ 29.

²⁰ *Id.* at ¶ 30.

²¹ *Id.* at n. 74.

²² *Access Charge Reform*, CC Docket No. 96-262, FCC No. 97-158, First Report and Order, 12 FCC Rcd 15982 (1997).

are interstate users of the local network: “In the 1983 *Access Charge Reconsideration Order*, the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities to originate and terminate interstate calls, ISPs should not be required to pay interstate access charges.”²³ The effect of the exemption was never to make ISP usage of the network “local traffic,” but simply to allow ISPs to obtain their interstate access services by paying local rates: “ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.”²⁴ The Commission continued to justify the exemption by stating that the imposition of interstate per-minute access charges on ISPs would chill development of the Internet. It concluded, “Information service providers may use incumbent LEC facilities to originate and terminate interstate calls.”²⁵

In late 1998, the Commission considered an ADSL offering proposed by GTE and revisited its analysis of ISP traffic.²⁶ GTE had sought a declaration that its new service was an interstate service that should be tariffed at the federal level. A variety of CLECs took the position that the connection between GTE’s end user customer and the ISPs’ POP should be treated as a local call, with a second information service call beginning at the ISPs POP and continuing onto the Internet. The Commission, however, agreed with GTE that this service was an interstate service.²⁷

²³ *Id.* at ¶ 341.

²⁴ *Id.* at ¶ 342.

²⁵ 12 FCC Rcd at 16131-32.

²⁶ *GTE Telephone Operating Cos. GTOC Tariff No. 1 GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 (rel. October 30, 1998).

²⁷ *Id.* at ¶ 16.

While clearly stating that its decision was limited to dedicated connections, rather than circuit-switched dial-up traffic, the Commission stated several conclusions that inevitably apply to dial-up traffic as well. The Commission concluded that the communications at issue did not terminate at the ISP's local server but continued to the ultimate destination or destinations on the Internet.²⁸ The Commission also rejected the argument that the historical treatment of ISPs as end users for purposes of the access charge exemption meant that Internet calls terminated locally.²⁹ "The fact that ESPs are exempt from certain access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs. That the Commission exempted ESPs from access charges indicates its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary."³⁰ The Commission summarized its past treatment of ISP traffic with respect to access charges, recognizing that ISPs do use interstate access services, but since 1983 have been exempted from the payment of certain access charges. "Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges."³¹ The Commission did not say that ESPs were treated as end users for purposes of characterizing their traffic, which has always been described as interstate traffic. Further, the Commission cited its own definition of "end user" which is "any customer of an interstate or foreign telecommunications service that is not a carrier."³² Thus, even where the Commission has treated ISPs as "end users" that term has always carried with it the qualification that the ISP is an end user of interstate services.

²⁸ *Id.* at ¶ 19.

²⁹ *Id.* at ¶ 21.

³⁰ *Id.* (emphasis added).

³¹ *Id.* at ¶ 7 (emphasis added).

³² 47 C.F.R. § 69.2 (m).

The fact that the Commission has exempted ISPs from access charges in the current rules and they pay local rates for network connections does not change the nature of the traffic. The CLECs mistakenly assume that because ISP traffic is exempt from access charges that it is “local.” However, as the foregoing review of the history of the ESP exemption indicates, in creating the ESP exemption, the Commission did not determine that ESP traffic is local, it simply allowed ESPs to purchase an interstate service at the price of local service. The Commission has always clearly stated that the traffic is interstate and would be subject to interstate access charges but for the exemption. It was only quite recently that revisionist history has begun calling ISP traffic “local traffic.” The Commission has consistently said that ISP traffic was access traffic and that, rather than pay per minute of use access charges, ISPs would receive their interstate access in exchange for paying end user charges.

III. The Historical Treatment of ISP Traffic Should Continue, Meaning That There Should Be No Reciprocal Compensation on ISP Traffic.

Section 251(g) requires that ILECs continue to provide information access on the same terms “including receipt of compensation” as they did prior to the 1996 Act, until “explicitly superseded by regulations prescribed by the Commission after such date of enactment.” Since the Commission admittedly has not implemented any inter-carrier compensation scheme for ISP traffic, the existing access compensation scheme remains in effect.

The Commission has determined that § 251(b)(5) of the 1996 Act should be interpreted such that only local traffic was subject to reciprocal compensation. The Commission has consistently referred to ISP traffic as interstate access service. Access traffic remained subject to the access charge regime. The ISP access charge exemption is simply a part of that interstate access charge regime. With respect to interstate access, payments flow from users of access services to the local exchange carrier. Local carriers share access charge receipts obtained from

interexchange carriers pursuant to meet point billing arrangements. To be consistent with how “exchange access” is treated under the Commission’s interpretation of § 251(b)(5), in the case of “information access,” the local exchange carriers must look to receipts obtained from information service providers as their compensation for such services.

In this regard, CBT concurs in the economic analysis offered by SBC to demonstrate that CLECs serving ISPs are compensated for their services, by the ISP.³³ As SBC comprehensively demonstrated, ISPs do not originate any traffic, so all of the payments received from ISPs go towards compensating the LEC for the cost of delivering traffic to the ISP. When a CLEC serves the ISP in place of an ILEC, the CLEC receives the same revenue from the ISP that the ILEC had received when it served the ISP. There is no basis for the CLEC to look to the ILEC to compensate it for handling this interstate access traffic. The interstate access charge regime clearly looks in the other direction, to the user of the interstate access service, the ISP.

IV. If the Commission Adopts A Different Compensation Scheme For ISP Traffic, It Should Not Be The Same As Reciprocal Compensation for Local Traffic.

CBT agrees with the USTA Whitepaper which thoroughly explains why reciprocal compensation on ISP traffic should not apply. Reciprocal compensation results in an inefficient and unfair allocation of cost, discourages efficient investment and stifles the development of real local exchange competition in favor of causing new market distortions. Simply put, applying reciprocal compensation to ISP traffic is bad public policy. While the Whitepaper indicates that all incentive to “game” the system is not removed even where the reciprocal compensation rate is set closer to cost, CBT believes movement toward cost is clearly a step in the right direction.³⁴

³³ SBC Communications, Inc. Comments at 28-39.

³⁴ Mark L. Evans and Aaron M. Panner, *Analysis of Issues on Remand in ISP Reciprocal Compensation Proceeding*, July 21, 2000 (“USTA Whitepaper”), at 12-14.

Both USTA and Verizon in their comments pointed out the significant traffic imbalance created by application of reciprocal compensation to ISP bound calls. USTA indicated a traffic ratio of “more than 10 to 1”,³⁵ while Verizon indicated that “Verizon overall is sending more than 21 times as much traffic as it is receiving.”³⁶ CBT’s experience, however, indicates that these numbers may be rather conservative. Even though Cincinnati has significant facilities-based switch competition, with 9 full service providers currently competing in Cincinnati, CBT has experienced an outgoing traffic ratio of over 25 to 1 in the aggregate. Among these service providers, one CLEC’s traffic is entirely one way and others have traffic that is nearly one way to the CLEC. Clearly an inflated and non-cost based compensation mechanism contributes to bad public policy, which is described by Verizon in its comments as having “numerous harmful societal consequences.”³⁷

The record in this proceeding strongly indicates that ISP bound traffic is not “local traffic” and, therefore, is not subject to reciprocal compensation. However, should the Commission determine that some sort of compensation is appropriate, in addition to the compensation LECs receive from ISPs, it must be based upon cost. As fully described in Verizon’s comments: “The cost to terminate calls to ISP’s is less than the cost to terminate a local call”.³⁸

Current Commission rules require that rates for transport and termination must be “structured consistently with the manner that carriers incur those costs.”³⁹ Reciprocal compensation rates have been developed based on average costs of handling all traffic on ILEC

³⁵ *Id.* at 13.

³⁶ Verizon Comments at 11.

³⁷ *Id.* at 11-16.

³⁸ Verizon Comments at 25-27.

³⁹ 47 C.F.R. § 51.709 (a).

networks. Such traffic has been of relatively short duration (3-4 minutes), as contrasted with ISP traffic that has much longer holding times (25-30 minutes). Existing reciprocal compensation rates spread non-duration sensitive costs over the length of an average call on the ILECs' networks to arrive at a single per minute rate that is applied to all local traffic. Using this same rate structure for ISP traffic, which has much longer holding times, would result in unjustified windfalls.⁴⁰ The Commission certainly has the authority to correct this injustice. Rates must be structured in accordance with how costs are incurred. Thus, CBT agrees with comments to the effect that rates must be "bifurcated" into those which are incurred per call, and those that are incurred per minute.⁴¹

V. Conclusion.

The Commission should reaffirm its prior conclusion that ISP bound calls are jurisdictionally interstate calls and reciprocal compensation does not apply to these non-local calls. The Commission should further indicate that these calls are not "telephone exchange service," but are either "access service" or "information access."

Respectfully submitted,

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⁴⁰ For example, if the setup cost of a call is \$.004 and the additional cost per minute is \$.001, a rate of \$.002 would recover the correct total cost of a 4 minute call of \$.008 (\$.001 x 4 mins. + \$.004 for setup). However, if the call is 24 minutes long, the same rate would recover \$.048 (\$.002 x 24 mins.), when the cost was only \$.028 (\$.001 x 24 mins. + \$.004 for setup). This would create a windfall in excess of 70% over cost.

⁴¹ See Sprint Comments at 3; Arbitration Award, attached to Public Utility Commission of Texas Comments, at 49.

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